IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.145 OF 2003
IN
SUMMARY SUIT NO.3076 OF 2002

Geeta N. Mehta ...Plaintiff
Vs.
Jagdish R. Parekh ...Defendant

Mr.B. Saraf i/b. Kiran Jain & Co. for Plaintiff

Mr.Subodh Joshi i/b. J.K. Makhija for Defendant

CORAM: D.G. DESHPANDE,J.
DATED: 23RD NOVEMBER, 2004

P.C.

1. Heard Advocates for the Plaintiff and the Defendant. The Plaintiff has filed this suit for recovery of loan amount of Rs.5,00,000/- with interest, however, Advocate for the Plaintiff has stated that in view of the Revision in Judgment he is not pressing for interest at all from the date of the suit.

2. The Summons for Judgment is opposed by the Counsel for Defendant on the ground that the suit is not maintainable as a Summary Suit as none of the documents filed by the Plaintiffs fall in the category mentioned and specified under Order 37 of the Code of Civil Procedure. He also contended that there is no written contract or agreement between the parties. He

relied on the Judgment of Shri Justice D.G.Karnik in support of his contention, reported in **2004 Maharashtra Law Journal, 114 wherein Shri Justice D.G. Karnik** after reproducing Sub Rule 2 of Rule 1 of Order 37 has observed that :-

> . "It is not disputed that the suit is not based on a written contract nor is based upon an enactment or on a guarantee and is therefore not covered by clause (b) of sub-rule (2) of Order XXXVII of the Code of Civil Procedure. Learned Counsel however, submits that the suit is covered under clause (a) of sub-rule (2) of Rule 1 of Order XXXVII of the Code of Civil Procedure. He submits that the cheque is a bill of exchange drawn on a bank and as money was advanced to the defendant by a cheque i.e. bill of exchange, the suit is based upon a bill of exchange and is maintainable as a summary suit. I am unable to agree. It is true that a cheque is a bill of exchange, a special type of bill of exchange which is drawn on a bank. However, a suit upon a cheque (bill of exchange) means a suit to recover money due on a cheque (bill of exchange) drawn by the defendant, which is dishonoured. The suit must be for recovery of money of a cheque drawn in favour of or endorsed to the plaintiff. A suit for recovery of a loan which was advanced by the plaintiff by a cheque is not a suit upon a cheque or a bill of exchange and as such is not maintainable as a summary suit. Therefore, contention of the plaintiff that present suit is upon a bill of exchange is rejected."

3. My attention is also drawn by the Advocate for the Defendant to page no.3 of the Plaint and

particularly the following portion of paragraph no.5:-

> " The Plaintiff craves leave to refer to and rely upon the bank statements, records and relevant entries as and when produced."

It was contended that none of these documents referred to above by the Plaintiff namely the Bank statements, record and relevant entries give any right to the Plaintiff to file the suit as a Summary Suit.

. Thirdly my attention is also drawn by the Advocate for the Defendant to paragraph no.13 of the plaint wherein the Plaintiff has stated that:-

> "Summary suit based on the aforesaid documents which constitutes a valid, legal and lawful written contract."

4. Counsel for the Defendant stated in this regard that none of the documents referred to and relied upon by the Plaintiff constituted, valid, legal and lawful written contract and therefore, summary suit is not maintainable. These were the three points pressed by the Defendant's Advocate to oppose the Summary Suit. I am not convinced by any of the submission made by the Advocate for the Defendant. There is clear Judgment by Shri Justice S.J. Vazifdar, **reported in 2003 Bombay Cases Reporter, 37** wherein it is held as follows :-

> " Unconditional acknowledgment of its liability, contains implied

promise that amount stated would be paid by defendant."

In the present case there is a clear cut acknowledgment by the Defendant of his liability and the acknowledgment is filed by the Defendant at Exhibit- A wherein the Defendant has clearly admitted on 12th July, 2001 that they are liable to pay Plaintiff a sum of Rs.5,00,000/-. Therefore, this is a case where the Judgment of Shri Justice S.J. Vazifdar squarely applies and the suit for recovery of the amount on the basis of acknowledgment is to be treated as a summary suit and the objection to maintainability on this ground is required to be rejected.

5. The contention of the Defendant is also liable to be rejected because what is statd in paragraph 5 is regarding payment of interest and it has nothing to do with the present claim as the claim for interest is given up by the Plaintiff upto the date of suit. In view of the Judgment of Shri Justice S.J. Vazifdar the acknowledgment gives the right to the Plaintiff to file a suit as a Summary Suit. Thirdly it was contended by the Counsel for the Defendant that the Provisions of Order 37 are required to be strictly construed. The scope of the word "Written Contract" and the suit which can be entertained as Summary Suit has been considered in the aforesaid Judgment of Shri

Justice S.J. Vazifdar, and in view of that Judgment this is a clear case where the Plaintiff can file the suit as Summary Suit. There is absolutely no defence on merits. There is a clear liability of the principle amount. Therefore, conditional leave is granted to the Defendant upon depositing of Rs.4,00,000/- in this Court within a period of 12 weeks.

6. In the event of the Defendant depositing the said amount, the suit to be transferred to the list of Commercial Causes. Written statement or points of defence to be filed within a period of 12 weeks from today and Affidavit of documents or list of documents within two weeks thereafter. Discovery or inspection of documents within two weeks thereafter. Suit to be placed on regular board for hearing thereafter.

7. In the event of the Defendant's depositing the amount of Rs.4,00,000/- in the Court as aforesaid, the Prothonotary & Senior Master to invest the said amount with a Nationalized Bank, initially for a period of three years and to renew the same thereafter for suitable periods until further orders of the Court. Advocate for the Plaintiff to follow the investment order with the Prothonotary and Senior Master.

8. If the Defendant fails to deposit the aforesaid amount in the Court, liberty to the

Plaintiff to have the suit set down forthwith for exparte hearing. The Summons of Judgment is disposed of.

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